JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

United Exploration (M) Sdn Bhd v IJM Corp Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT6–22–95 OF 1996
NOR BEE ARIFFIN JC
10 AUGUST 2010

Contract — Building contract — Sub-contract — Claim for payment for work done — Whether plaintiff entitled to balance of sum owing under subcontract — Whether defendant justified in making various deductions and omissions which denied plaintiff of amount claimed — Whether plaintiff proven on balance of probabilities that it completed work as stipulated in letter of award — Counterclaim — Whether plaintiff in breach of its contractual obligations to defendant

Sime UEP Development Sdn Bhd appointed the defendant as the main contractor for its housing project development in Subang Jaya, Selangor. The defendant in turn appointed the plaintiff to be the subcontractor of a part the said project for the agreed sum of RM3,802,694.48. In addition, the plaintiff was also awarded certain additional works to the subcontract amounting to RM344,975.71, thereby entitling the plaintiff to the total sum of RM4,147,670.19 under the subcontract. The work awarded to the plaintiff was subcontracted to Aik Soon Enterprise ('ASE') for a contract sum of RM2,976,966.27 on the arrangement that payment would be on a back to back basis, ie that the plaintiff would pay ASE whenever the plaintiff received payment from the defendant. The plaintiff claimed that the defendant had only paid the plaintiff the sum of RM686,000 under the subcontract, leaving a sum of RM3,461,670.18 unpaid. The plaintiff thus commenced the present action against the defendant claiming the sum of RM3,461,670.18, as the balance of the sum owing under the subcontract. The plaintiff's claim was based on the letter of award which set out the subcontract sum as RM3,802,694.48. The defendant pleaded that the plaintiff's claim was unsustainable as there were omission of works, which were omitted or revoked from the plaintiff's scope of work to avoid and mitigate the delay and to assist the plaintiff in completing the project. The defendant thus submitted that the amount paid to the defendant was the sum due to the plaintiff as the defendant had spent its own monies for the purchase and supply of building materials and employing other subcontractors to complete the project. The defendant further pleaded that the plaintiff had breached its contractual obligations in that the works done were alleged to be of poor quality and as a result of which the defendant was obliged to complete and rectify the works at its own expense. The defendant thus filed a counterclaim in the sum of RM1,282,297, which

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

included claims such as costs of prolonging the project and liquidated ascertained damages consequent to the delay that had taken place.

Held, dismissing the plaintiff's action with costs and allowing the defendant's counterclaim in part with costs:

(1) Although there was no formal contract entered into between the parties, the acceptance of the letter of award is a binding contract. When the letter of acceptance, accepting the letter of award, was signed by the director of the plaintiff's company there was no breakdown of the subcontract sum of RM3,802,694.48, and it was the plaintiff's case that there were no supporting tender documents accompanying the letter of award. However, based on the evidence of the parties it was found that the bill of quantities ('BQ') formed part of the letter of acceptance, as the amount stated therein amounting to RM3,802,694.48, tallied with the subcontract sum that appeared in the letter of award. This meant that the plaintiff had to abide by the BQ (see paras 5–7).

(2) Although the plaintiff never wrote to inform the defendant that ASE was its agent, the evidence showed that ASE had acted as the agent on behalf of the plaintiff. The evidence showed that ASE was the one that had submitted claims for progress payment to the defendant on behalf of the plaintiff and that the plaintiff's participation was through ASE. The evidence also showed that the plaintiff had displayed a total lack of interest in running or managing the construction of the said project and that ASE appeared to have been entrusted to single handedly manage it. By its conduct the plaintiff was thus estopped from asserting the absence of its agency relationship with ASE and it is estopped from claiming, amongst others, that the defendant had given the cheques and payment vouchers to an unauthorised entity (see para 9).

(3) The plaintiff bore the burden of proving on a balance of probabilities that it had completed the work as stipulated in the letter of award and to prove that ASE as its sole subcontractor had completed the work as scheduled. However, it was clear from the evidence adduced that the plaintiff had failed to discharge its burden. Further, the evidence showed that ASE managed to complete only 70% of the project before it ran into financial difficulties. The plaintiff had not shown any evidence as to how ASE had completed the project in full except to say that the project was completed. As the evidence showed that the plaintiff paid ASE on a back to back basis, to complete the project the plaintiff must prove that ASE had been paid at least RM2,976,966 but ASE only received RM600,000. Thus the plaintiff could not have completed the project through ASE alone (see para 10).

(4) The plaintiff's claims for material supplied for the project could not stand. The defendant explained through its witnesses that it was its

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

practice to supply building material for all subcontract work it awarded, so as to ensure quality. Thus, the plaintiff could not claim that it had not been furnished with a full account of the materials supplied by the defendant. In any case, the plaintiff did not purchase any material because it had subcontracted the work totally to ASE and it was ASE which was responsible to purchase the material for the job (see para 14).

(5) The defendant had adduced evidence of having written to the plaintiff reminding them to take measures to move on with their work in order to avoid delay in completing the project but the plaintiff did not see it fit to reply to the letter or to express any disagreement. If there had never been any failure on the part of the plaintiff in carrying out the project, it was only reasonable to expect from it a prompt and vigorous denial. By failing to do so, the plaintiff was estopped from denying the correctness of the contents of the letter. The defendant also provided particulars and details of other subcontractors appointed and payments made to them to carry out the work contracted to the plaintiff. However, the plaintiff had not tendered any evidence as to why these matters do not merit consideration. Based on the evidence viewed in totality it was clear that the plaintiff knew well that it was the employment of other subcontractors, after ASE that led to a completion of the project. As such, the defendant was justified in making the various deductions and omissions which denied the plaintiff of the amount claimed (see paras 16–17).

(6) The defendant had not proven its claim against the plaintiff but for the claim on the repairs and rectification works not completed by the plaintiff. As the rectification work amounting to RM88,603.85 was not refuted by the plaintiff other than to say that the claim was baseless and wrong, that claim was allowed with cost and interest (see para 22).

[Bahasa Malaysia summary

Sime UEP Sdn Bhd melantik defendan sebagai kontraktor utama bagi projek pembangunan perumahannya di Subang Jaya, Selangor. Defendan kemudiannya melantik plaintif sebagai subkontraktor bagi sebahagian projek tersebut dengan jumlah yang dipersetujui RM3,802,694.48. Sebagai tambahan, plaintif juga diberikan beberapa kerja-kerja tambahan ke atas subkontrak tersebut berjumlah RM344,975.71, yang memberikan plaintif jumlah keseluruhan RM4,147,670.19 di bawah subkontrak tersebut. Kerja yang diberikan kepada plaintif disubkontrakkan kepada Aik Soon Enterprise ('ASE') bagi kontrak sejumlah RM2,976,966.27 dengan aturan bahawa pembayaran dibuat atas dasar back to back, iaitu plaintif akan membayar ASE apabila plaintif menerima bayaran daripada defendan. Plaintif mendakwa bahawa defendan hanya membayar plaintif sejumlah RM686,000 di bawah subkontrak tersebut, dan baki RM3,461,670.18 belum dibayar. Oleh itu plaintif memulakan tindakan ini terhadap defendan menuntut sejumlah

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

RM3,461,670.18, baki jumlah yang terhutang di bawah subkontrak tersebut. Tuntutan plaintif adalah berdasarkan surat award yang menyatakan jumlah subkontrak adalah RM3,802,694.48. Defendan memplid bahawa tuntutan plaintif tidak dapat dikekalkan kerana wujudnya peninggalan kerja-kerja, yang mana dikeluarkan atau dibatalkan daripada skop kerja plaintif untuk mengelak dan mengurangkan kelewatan dan untuk membantu plaintif menyempurnakan projek tersebut. Maka, defendan menghujah bahawa jumlah yang dibayar kepada defendan adalah jumlah yang terakru kepada plaintif kerana defendan telah membelanjakan wangnya sendiri untuk membeli dan membekal barangan pembinaan dan menggaji subkontraktor-subkontraktor lain untuk menyempurnakan projek tersebut. Defendan selanjutnya berhujah bahawa plaintif telah melanggar kewajipan-kewajipan kontraknya yang mana kerja-kerja yang dilakukan dikatakan berkualiti rendah dan akibatnya, defendan pula bertanggungjawab menyelesaikan dan membetulkan kerja-kerja tersebut dengan perbelanjaannya sendiri. Oleh itu, defendan memfailkan tuntutan balas dalam jumlah RM1,282,297, termasuk tuntutan kos melambat-lambatkan projek tersebut dan ganti rugi yang telah ditentukan akibat daripada kelewatan yang telah berlaku.

Diputuskan, menolak tindakan plaintif dengan kos dan membenarkan sebahagian tuntutan balas defendan dengan kos:

(1) Walaupun tiada kontrak rasmi antara pihak-pihak, penerimaan surat award merupakan kontrak mengikat. Apabila surat penerimaan, menerima surat award itu, ditandatangani pengarah syarikat plaintif, tiada huraian subkontrak sejumlah RM3,802,694.48, dan menjadi kes plaintif bahawa tiada dokumen-dokumen tender menyokong dilampirkan bersama surat award. Walau bagaimanapun, berdasarkan keterangan pihak-pihak didapati bahawa *bill of quantity* ('BQ') membentuk sebahagian surat penerimaan, kerana jumlah yang tercatat ialah RM3,802,694.48, selaras dengan jumlah subkontrak di dalam surat award. Ini bermakna plaintif harus mematuhi BQ (lihat perenggan 5–7).

(2) Walaupun plaintif tidak pernah menulis untuk memaklumkan defendan bahawa AES merupakan ejennya, keterangan menunjukkan bahawa AES bertindak sebagai ejen bagi pihak plaintif. Keterangan menunjukkan bahawa ASElah yang menyerahkan tuntutan-tuntutan pembayaran ikut kerja kepada defendan bagi pihak plaintif dan bahawa penglibatan plaintif adalah menerusi ASE. Keterangan juga menunjukkan bahawa plaintif memperlihatkan ia tidak langsung berminat dalam menjalankan atau menguruskan pembinaan projek tersebut dan bahawa ASE kelihatan diamanahkan untuk sendiri menguruskan projek itu. Melalui tindakannya, plaintif diestop daripada menegaskan ketiadaan hubungan agensi dengan ASE dan ia diestop daripada menuntut, antara lain,

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

bahawa defendan telah memberi cek-cek dan baucar-baucar pembayaran kepada entiti yang tidak diberi kebenaran (lihat perenggan 9).

(3) Plaintif mempunyai beban untuk membuktikan atas imbangan kebarangkalian bahawa ia telah menyempurnkan kerja yang dinyatakan dalam surat award dan untuk membuktikan bahawa ASE sebagai satu-satunya subkontraktor telah menyempurnakan kerja tersebut seperti yang dijadualkan. Walau bagaimanapun, adalah jelas daripada keterangan yang dikemukakan bahawa bahawa plaintif telah gagal membuktikan beban pembuktiannya. Selanjutnya, keterangan menunjukkan bahawa ASE hanya berjaya menyempurnakan 70% daripada projek tersebut sebelum ia mengalami masalah kewangan. Plaintif tidak menunjukkan sebarang keterangan bagaimana ASE telah menyempurnakan projek tersebut sepenuhnya kecuali menyatakan bahawa projek tersebut telah selesai. Memandangkan keterangan menunjukkan bahawa plaintif membayar ASE secara *back to back*, untuk menyempurnakan projek tersebut, plaintif mesti membuktikan bahawa ASE telah dibayar sekurang-kurangnya RM2,976,966 tetapi ASE hanya menerima RM600,000. Oleh itu, plaintif tidak boleh menyempurnakan projek tersebut hanya menerusi ASE (lihat perenggan 10).

(4) Tuntutan-tuntutan plaintif bagi bahan yang dibekalkan untuk projek tersebut tidak kukuh. Defendan menjelaskan bahawa melalui saksi-saksinya bahawa ia merupakan amalannya untuk membekalkan bahan-bahan pembinaan bagi semua kerja subkontrak yang ia awardkan, untuk menjamin kualiti. Oleh itu, plaintif tidak boleh mendakwa bahawa ia tidak dibekalkan sepenuhnya bahan-bahan yang telah dibekalkan defendan. Namun, plaintif tidak membeli sebarang bahan kerana ia telah mengsubkontrakkan kerja tersebut sepenuhnya kepada ASE dan ASE yang bertanggungjawab untuk membeli bahan bagi kerja itu (lihat perenggan 14).

(5) Defendan telah mengemukakan keterangan bahawa ia menulis kepada plaintif mengingatkannya untuk mengambil langkah-langkah meneruskan kerja-kerja mereka bagi mengelakkan kelewatan dalam menyiapkan projek tersebut tetapi plaintif merasakan tidak sesuai untuk membalas surat itu atau menyatakan apa-apa percanggahan pendapat. Jika tiada kegagalan di pihak plaintif dalam menjalankan projek itu, maka adalah wajar untuk menjangkakan penafian segera dan tegas daripadanya. Kegagalan berbuat sedemikian, plaintif diestop daripada menafikan ketepatan isi kandungan surat tersebut. Defendan juga memberikan butiran dan perincian subkontraktor lain yang dilantik dan bayaran yang telah dibuat kepada mereka untuk menjalankan kerja yang telah dikontrakkan kepada plaintif. Walau bagaimanapun, plaintif tidak mengemukakan sebarang keterangan tentang mengapa perkara-perkara tersebut tidak perlu dipertimbangkan. Berdasarkan keterangan yang

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

dilihat secara keseluruhan, adalah jelas bahawa plaintif amat mengetahui bahawa ia adalah pekerjaan subkontraktor lain, setelah ASE, yang menyiapkan projek tersebut. Oleh itu, adalah wajar bagi defendan membuat pelbagai penolakan dan peninggalan yang menafikan plaintif jumlah yang dituntut (lihat perenggan 16–17).

(6) Defendan tidak membuktikan tuntutannya terhadap plaintif tetapi bagi tuntutan pembaikian dan pembetulan kerja-kerja yang tidak disiapkan plaintif. Disebabkan kerja pembaikan berjumlah RM88,603.85 tidak dipertikaikan oleh plaintif selain menyatakan bahawa tuntutan tersebut tidak berasas dan salah, tuntutan tersebut dibenarkan dengan kos dan faedah (lihat perenggan 22).]

Notes

For cases on sub contract, see 3(2) *Mallal's Digest* (4th Ed 2010 Reissue) paras 2997–3006.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Caltex Oil Malaysia Ltd v Classic Best Sdn Bhd & Ors [2007] 4 MLJ 772, HC (refd)

KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233, CA (refd)

Subry bin Hamid v Husaini Tan Sri Ikhwan & Anor [2006] 6 MLJ 229, CA (refd)

Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1996] 1 AMR 7, CA (folld)

Legislation referred to

Evidence Act 1950 s 114(g)

Albert Khoo (Chin & Rakan-Rakan) for the plaintiff.
T Shanmugaraj (ET Low with him) (Ngae Shan Kalai & Co) for the defendant.

Nor Bee Ariffin JC:

THE PLEADINGS

[1] The defendant was appointed as the main contractor by Sime UEP Development Sdn Bhd ('Sime UEP') for the construction and completion of phase 11A development consisting of 294 units of houses, phase 15A/1 development consisting of 95 units of houses, phase 15A/2 and 16A development consisting of 227 units of houses and phase 2B development consisting of 238 unit of houses on Lot 2026, UEP Subang Jaya, Mukim Damansara, Daerah Petaling Jaya, Selangor. By a written agreement dated 17

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

October 1989 the defendant subcontracted the works in phase 15A/1 to the plaintiff for the sum of RM3,802,694.48 (the defendant's letter of acceptance at p 1 & 2 of bundle B1). The other phases were awarded to Lee Mun Thong Sdn Bhd. The letter of acceptance specified the time for completion of the project as 11 months from 1 November 1989, supposedly to be in line with the defendant's master construction program set for 30 September 1990 and the scope of works which was to exclude from the subcontract piling works, plumbing and sanitary installation, electrical services and external works outside the house boundary. The plaintiff spelt out external works outside the house boundary to mean the water supply lines, sewerage lines, street lighting, back lanes, road works and roadside drains and LLN substation. These works were to be carried out by the defendant's other subcontractors, amongst others were Sun Fatt Trading, Aik Soon Enterprise ('ASE'), Irama Baru and Sykt Letrik Kitlite. There were additional and variation works to the subcontract amounting to RM344,975.71. Total amount of work given to the plaintiff was RM4,147,670.19. The defendant paid the plaintiff RM686,000 under the subcontract leaving a sum of RM3,461,670.19 unpaid and by this action, the plaintiff is claiming that sum from the defendant.

[2] The defendant pleaded that the plaintiff's claim was unsustainable as there were omission of works which were omitted or revoked from the plaintiff's scope of work either because the works were provisional or were executed by the defendant on behalf of the plaintiff with the plaintiff's acquiescence. To avoid and mitigate the delay and to assist the plaintiff in completing the said project, the plaintiff and the defendant have mutually agreed that the defendant on behalf of the plaintiff shall purchase building materials except cement and steel bars and all costs of materials purchased would be debited into the account of the plaintiff together with a service charge of 2½%. It was also agreed that the defendant would employ other subcontractors and to mobilise the defendant's workforce to expedite and complete the said project and in the process to make direct payments to the subcontractor. Hence, the amount paid according to the defendant was the sum due to the plaintiff as the defendant had spent RM1,750,266.40 for the purchase and supply of the building materials and another RM909,975 being the costs for employing other subcontractors to complete the said project.

[3] The defendant further pleaded that the plaintiff had breached its contractual obligations in that the works done were alleged to be of poor quality and as a result of which the defendant was obliged to complete and rectify the works on its own and by employing other subcontractor to do the same. The breach and the failure had also resulted in the said project to be completed only on 31 October 1991, a delay of 13 months, and this delay had caused the defendant to suffer losses and damages and its reputation and good name injured. The defendant claimed it no longer received contracts or

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

projects from its employer Sime UEP following the delay in the completion of the said project. For the losses and damages it alleged to have suffered due to the plaintiff's breach of its contractual obligations, the defendant filed a counterclaim in the sum of RM1,282,297 which includes incidental claims such as prolongation costs and liquidated ascertained damages (LAD) consequent to the delay that had taken place.

THE WITNESSES AND THE DOCUMENTS

[4] The plaintiff's sole witness ('PW1') is a director of the plaintiff's company which runs a business as soil investigation, engineering and building contractor. Three witnesses testified for the defendant, namely the defendant's contract manager who was also a site quantity surveyor ('DW1'), the sole proprietor of Aik Soon Enterprise (ASE) (DW2) and another site quantity surveyor who was assisting DW1 ('DW3'). The trial sees the production of and references made to voluminous documents. The pleadings and the agreed facts referred to earlier are in bundles A and D respectively. There are nine bundles of agreed documents marked as B1, B2, B3, E1, E2, E3, E4, E5 and E6. The non-agreed documents are in bundle C.

ON THE LETTER OF AWARD AND A FORMAL CONTRACT

[5] The plaintiff's claim is based on the letter of award (pp 1–2/B1 and also appears at pp 5–6/E1). There was no formal contract entered into between the parties. DW1 explained that the defendant had in fact drafted a formal contract but before it could be executed, there emerged a lot of problems at the project site. However, he said that in the absence of a formal contract, the acceptance of the letter of award is a binding contract by virtue of para 5 of the letter of award. It has been a practice in the defendant's company that a formal contract is prepared and signed after the letter of award was issued, and the absence of it would not have affected the performance of the contract as tender document had incorporated the main contract terms and conditions, specific action and the bill of quantities ('BQ'). PW1 denied submitting any tender document whilst DW's stand was that Goh Chye Lai from ASE would have given this tender document to the plaintiff to submit the quotation.

[6] There was no breakdown of the RM3,802,694.48 when PW1 signed the letter of acceptance. PW1 put his years of experience in the building industry to come up with an estimation of RM40,000 per unit of house for 95 units based on the defendant's description on the area and the size of the building. PW1 nevertheless agreed that the amount for the various items and figures appearing at pp 1–7/E6 which totaled up to RM3,802,694.48 were important component of a tender document but he claimed he did not receive them, and neither did he ask for one as he considered the letter of award was complete by

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

itself even without pp 1–7/E6. In short, it is the plaintiff's case that those supporting tender documents had not accompanied the letter of award.

[7] The issue here is whether the BQ at pp 1–7/E6 forms part of the letter of acceptance. If it is, then the plaintiff are to abide by the BQ. DW1 testified that the sum of RM3,802,694.48 was worked out from the details as per the BQ shown at pp 1–7/E1. The total sum of RM3,802,694.48 shown at p 2/E6 tallies with the total sum appearing in the letter of award. Evidence had it that the negotiation over the subcontract sum was done by Goh Chye Koon who was DW1's boss and also the project co-ordinator. DW1 did not assist Goh Chye Koon in the negotiation but only submitted to him the BQ that DW1 had. Goh Chye Koon then gave DW1 the draft in his own handwriting of the summary of the agreed contract sum from the summary BQ. DW1 said he was only given the summary of the subcontract prices that was agreed by them and no notes was given to him in respect of the details of the negotiation. The contract amount was agreed by his boss Ong Yeng Tien who was the project director because he's the person authorised to sign the letter of award. When asked how did he prepare the BQ for the contract without the details of the negotiation, DW1 said pp 1–7/E6 was rewritten by him based on the summary of the subcontractor price given by Goh Chye Koon. Ong Yeng Tien signed the letter of award in the presence of Lee Mun Thong who was representing the plaintiff and this letter of award at pp 5–6/E1 together with final summary was given to him. Lee Mun Thong did not at that time inform the defendant that he would not be involved in the said project or that PW1 would be in charge of the said project. So it highly improbable to my mind that the plaintiff had not received the BQ as Lee Mun Thong was then part of the plaintiff. Even though Ong Yeng Tien and Lee Mun Thong might not have signed pp 1–7/E6, and DW1 said he wouldn't know why as it was returned to him without the signatures and without pp 3–7/E6 dated but I find DW1's evidence as regards the preparation of the BQ and the subsequent events that he had testified on as consistent and credible and I have no reason to doubt that the BQ forms part of the letter of acceptance. PW1's denial holds no logic and cannot be true because the subcontract sum is stated to be in the exact figure of RM3,802,694.48. The figure could not have been arrived at if there had not been a BQ as worked out by DW1. PW1's estimate based on RM40,000 per house for 95 houses certainly does not come to an exact figure of RM3,802,694.48.

WAS ASE AN AGENT OF THE PLAINTIFF?

[8] The plaintiff disclaimed the existence of such relationship. It is common ground that the work awarded to the plaintiff was in turn subcontracted to ASE (see pp 6 and 7/B1) for a contract sum of RM2,976,966.27. The duration for the completion of the whole work thus subcontracted remains the period the

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

plaintiff was to complete its work for the defendant ie 1 November 1990. On the arrangement of payment to ASE, PW1 said the plaintiff would pay them whenever the plaintiff received the money from the defendant, on a back to back basis. PW1 confirmed that there was no instance where the plaintiff made payment to ASE before receiving payment from the defendant and that the pattern of payment has always been that all cheques paid to ASE were paid only after the plaintiff received the payment from the defendant. I am mindful to state even at the onset that the plaintiff did not seem to be interested in virtually anything regarding the subcontract as virtually everything was left to ASE to attend to, and it was not until PW1 received the SPC 19 that interest started to generate. PW1 also showed lack of interest in the breakdown quotation for ASE's contract sum of RM2,976,966.27 which he knew was computed by ASE themselves and at the most, he merely expressed contentment with it. Evidence of DW2 shows that it was Goh Chye Koon who had worked out the said sum with him.

[9] DW1 agreed that the plaintiff never write to inform the defendant that ASE was the plaintiff's agent or that Cheng Chiang Boey or Goh Chye Lai were the plaintiff's agents. Be that as it may, the following evidence shows that ASE had indeed acted as an agent of and has been acting for or on its behalf:

(a) PW1 confirmed that there was no progress claim made from the plaintiff to the defendant or from ASE to the plaintiff and that the plaintiff was not bothered to know the value of work that has been done and depended on the defendant to pay as and when they like. DW2 confirmed that ASE was the one that had submitted claims for progress payment to the defendant on behalf of the plaintiff;

(b) DW2 testified that the plaintiff's participation was through ASE but since the cheque was payable in the name of the plaintiff, Lee Mun Thong had allowed ASE to collect the cheques on the plaintiff's behalf and except for a few direct payment by the defendant to the plaintiff, ASE had collected the cheques for RM686,000 on the plaintiff's behalf and pass them to the plaintiff;

(c) PW1 said he did not receive the defendant's master work programme and he himself did not furnish the plaintiff's own work programme to the defendant as the latter did not request the plaintiff to do so and because the defendant had wanted them to follow the defendant's master work programme. PW1 claimed that he could still monitor and has direct and actual knowledge on the progress of the said project because he visited the site once a week during construction and there he talked to DW2 or Goh Chye Lai and looked at the site report. I do not for a moment think that PW1 could have such effective monitoring as he also did not attend any site meeting and has very minimum correspondence with the defendant.

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

The conduct of the plaintiff in this regard would only leave the impression that the work on the construction work was left to ASE in entirety at all material time;

(d) The plaintiff did not have a site office and was using ASE's site office and has no personnel on the work side. PW1 testified that the plaintiff had not come up with a single cent from its pocket either to maintain its own office or any site personnel or to purchase material or to pay ASE for the subcontract;

(e) DW1 testified that in the course of his dealing with the plaintiff, Goh Chye Lai or ASE representative's dealing with the defendant on behalf the plaintiff was not confined only to collecting the cheque and the SPC but they were also dealing with the defendant in the co-ordination and supervising of the work and in particular, Goh Chye Lai also deal with the defendant in all the QS works.

(f) There was an instance where plaintiff had written to the defendant acknowledging Goh Chye Lai or ASE representative as representing the plaintiff (p 45/B1) when using the words 'our' Mr Goh Chye Lai;

(g) PW1 maintained that he never wrote to ASE to say that they were agent acting for the plaintiff and he did not give authorisation to the defendant that ASE could collect payment on its behalf and had not asked ASE to act for the plaintiff in respect of the collection of the cheques. PW1 however admitted that ASE was actually doing the plaintiff a favour in collecting the cheques from the defendant. It thus appears obvious to me that PW1 had consented to ASE acting on its behalf as the payments collected went on over a period of time. PW1 admitted the following payments, amongst others, were made to the plaintiff:

(i) SPC 1 (p 631/E3), the first payment of RM28,000 was released to the plaintiff on 5 December 1989 (remittance advice for SPC 1 (p 9/B1)). DW2 said Goh Chye Lai collected the payment vide voucher dated 13 December 1989 (p 10/B1) passed it to the plaintiff and the latter did not dispute it;

(ii) SPC 2 (p 633/E3) — only shows a summary of work done. The details are provided in the Appendix A attached to the SPC (p 634/E3). Amount paid was RM30,000 and the cheque was collected by Goh Chye Lai and handed to the plaintiff;

(iii) the third progress payment of RM48,000 (p 635/E3). Remittance advice acknowledged by Goh Chye Lai. PW1 acknowledged that the plaintiff received the RM48,000 from Goh. PW1 testified that when he received the cheque from Goh, he did not tell Goh that the latter had no authority to collect the cheque. The plaintiff allowed Goh to continue collecting cheques from the defendant,

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

and following that there were payments for SPC 3 for RM46,000 (p 16/B1), a payment voucher from the defendant to the plaintiff for RM40,000 (p 60/E1) received by Goh Chye Lai on behalf of the plaintiff and finally PW1 admitted that the plaintiff received the RM686,000 and PW1 could identify Goh's signature at pp 5, 6, 7, 8, 9, 10, 12, 13, 14 and 15/B3 and confirmed that the cheques were received by the plaintiff.

(h) the memos at pp 10, 11, 12, 13,14, 15 and 16A/E6 were addressed to the defendant signed by Goh Chye Lai and Cheng Chiang Boey and carried the heading of Lee Mun Thong Sdn Bhd which was cancelled and substituted with the plaintiff's name. PW1 put up a bare denial that the two were authorised to write to the defendant and denied receiving them all even though they were carbon copied to the plaintiff. PW1 claimed that ASE printed the memos themselves and dismissed the suggestion that it was the plaintiff who gave the memos to ASE. DW2 explained that the letterhead was given by Lee Mun Thong. I accept DW2's testimony as credible as the memos were written to request for credit notes to be issued for some wrong deductions of material purchased and these are for the benefits of the plaintiff;

(i) as I had stated earlier on, PW1 confirmed that he had never attended any site meeting whilst Lee Mun Thong attended once. Records of site meetings showed DW2 and Goh Chye Koon had been attending as representatives of the plaintiff. At the meeting held on 4 November 1999 (p 42/B3), DW1 said Lee Mun Thong had not objected to DW2 and Goh Chye Lai representing the plaintiff. Subsequent to the meeting, the plaintiff did not write to the defendant informing that DW2 and Goh Chye Lai are not to attend further meeting on their behalf and the two continued to attend the site meetings on behalf of the plaintiff.

The above incidents demonstrate clearly that it could not have been probable for ASE not to have acted as the agent or for or on behalf of the plaintiff (see the case of *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233). Those incidents could only have taken place if the plaintiff had allowed ASE to act as such. After all, the plaintiff had displayed their total lack of interest in running or managing the construction of the said project and evidence shows that ASE appeared to have been entrusted to single handedly managed it. PW1 did not even has knowledge whether ASE did submit any progressive claim to the defendant on the plaintiff's behalf. PW1's perception that very little correspondence with the defendant means that the project was moving smoothly and within the time frame because if the defendant was unhappy with their work, they would have written a lot of letters to the plaintiff is to my mind misconceived. He did not have many correspondences because the works were all carried out by ASE. The plaintiff by its conduct has proceeded with the construction and completion of the said project on the basis that ASE or its

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

representatives has been authorised to deal with the defendant in all aspect of the said project. By its conduct, the plaintiff is estopped from asserting the absence of its agency relationship with ASE and the plaintiff is estopped from claiming, amongst others, that the defendant had given the cheques and payment vouchers to an unauthorised entity (*Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331).

[10] The plaintiff bears the burden to prove on the balance of probabilities that they had completed the work as stipulated in the letter of award. It is imperative too for the plaintiff to prove that ASE being its sole subcontractor has completed the work as scheduled. To do that the plaintiff must show evidence that ASE has completed the subcontract work valued at RM2,976,966.27 and this is excluding the additional works of RM344,975.71 required to be done by the plaintiff. It is clear from the evidence adduced that the plaintiff has failed to discharge its burden as DW2 said that ASE managed to complete only 70% of the project and had then ran into financial difficulties. DW2 said the matter was discussed with Lee Mun Thong who had asked him to sort out the matter with the defendant. DW2 also said he had no alternative other than to agree and accept the defendant's decision to appoint other subcontractor to complete the project in order to avoid huge financial implications if the project was not completed in time. No evidence was led by the plaintiff to show that DW2's testimony in this respect is untrue. The plaintiff itself has not shown how ASE has completed the project in full except to say that the project was completed. It was submitted to me by learned counsel for the defendant that as the plaintiff was never at all involved in the project, it is incumbent on the plaintiff to call ASE's personnel in particular Goh Chye Koon to support the plaintiff's contention that their subcontractor has completed the work. The defendant on their part has called DW2 to testify on the same issue. Learned counsel for the defendants has urged the court to invoke the application of s 114(g) of the Evidence Act 1950 saying that the presumption of adverse inference is real since the plaintiff knew that the evidence of ASE's personnel such as Goh Chye Lai if produced would be unfavourable or detrimental to the plaintiff and cited the case of *Subry bin Hamid v Husaini Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229; [2006] 4 CLJ 50) in support thereof. I do not see how the evidence of Goh Chye Lai would be any different from the evidence of DW2 in this respect and I therefore decline to consider the request.

Evidence also shows that the plaintiff made payments to ASE on a back to back basis upon receipt of payments from the defendant. To complete the work, the plaintiff must prove that ASE had been paid of at least RM2,976,966. No evidence was adduced to show this amount had been paid to ASE. On the contrary, the plaintiff admitted to receiving only RM686,000 from the defendant which were paid out based on the 21 SPC. This sum of RM686,000 was received by way of remittance advise (eg at pp 9, 16, 21, 23, 26, 30, 37, 39,

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

42 and 47) and paid as advanced payment. DW2 testified that out of RM686,000, ASE only received about RM600,000 from the plaintiff as the plaintiff paid ASE 10% less the amount they collected from the defendant. The evidence thus far shows that the plaintiff could not have completed the project through ASE alone.

[11] The project scheduled to be completed on 30 September 1990 was only certified by the architect to be practically completed on 31 November 1991. PW1 conceded that the plaintiff did not complete its work on or before 30 September 1990 but maintained that the plaintiff was given an extension of time. By a letter dated 28 Feberuary 1991 (see pp 138–142/B1), the defendant sent the completion programme (p 139) which specified the plaintiff's outstanding and rectification works it was to complete. Appearing therein are the words 'EOT date 30.4.1991'. The plaintiff construed that to mean 'Extension of Time' and PW1 claimed that the plaintiff completed its works within the time allocated. DW1 explained that there was no extension of time given to the plaintiff but the plaintiff was given a revised programme chart ie new date line chart to complete the works. By a letter dated 12 March 1993, the defendant informed the plaintiff that Sime UEP had imposed LAD amounting to RM260,205 @ RM33 per unit per day (p 150/B1) but subsequently all LAD deductions were released by Sime UEP on 23 December 1994. There was no doubt that there was a 13 months delay and the circumstances showed that the plaintiff's assertion that it was they which had completed the work by 30 April 1991 is devoid of merits because the work was completed not by the plaintiff or ASE but by other subcontractor engaged by the defendant to complete the plaintiff's work.

ON SPC 19 AND SPC FINAL

[12] The defendant said that the amount due to the plaintiff was only RM3,081.77 as stated in the SPC final (p 161/ B1). The plaintiff claimed that they were entitled to RM3,461,670.19 and disputed both the SPC19 and the SPC final. From SPC19, it can be seen that the defendant made deductions of the materials supplied to the sum of RM1,516,757.56, RM601,684.84 for direct payment to other subcontractors and RM524,000 for advance and the plaintiff was paid RM80,000. As for the SPC Final, there was a deduction made for omission in the sum of RM798,347.02 (pp 166–167/B1) constituting RM216,516.76 for external works within lot boundaries, RM40,000 for preliminaries, RM41,812.26 for variation order by architect and there was also deduction of RM909,950 for direct payment to other contractors.

[13] Evidence shows that except for SPC 1 which was prepared by DW3, the rest were prepared by DW1. DW1 testified that he prepared four copies, have

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

them submitted to the project manager for checking and approval before submitting three copies to the account department. The SPC were then checked by the account department and forwarded to the project coordinator or the project manager to be signed and approved for payment. Two copies of the completed, checked and signed SPC would be returned to him, one copy to be handed over to the subcontractor and he would retain a copy. Sometimes the subcontractor took his copy from the account department. DW1 confirmed that the various payment cheques in respect of the respective SPC 1 to SPC 21 were forwarded to the plaintiff through their representative Goh Chye Lai or ASE's representative together with the respective debit notes ('DN') and direct issue notes ('DIN'). He further stated that they were not given to the plaintiff directly because it was Goh Chye Lai who has been collecting the cheques and also made queries on the DN in the memos at pp 10, 11, 12, 13, 14, 15 and 16/E6. Goh Chye Lai, said DW1, did not dispute the amount in the SPC nor the amount of material supplied by the defendant. It is to my mind, improbable for the plaintiff to only receive the cheques without knowing how the sum stated in the cheques was arrived at and not raising or registering any complaint or objection on the sum stated in the various progress payment cheques if at all they did not agree to the figures. Evidence seems to suggest that the plaintiff was fully conscious of the progress claims (see pp 17 and 41/B1). DW1 testified that when Goh Chye Lai was no longer working for the subcontractor, collection was done by DW2 or ASE's supervisor Ong Weng Seng. Evidence of DW1 and corroborated by DW2 who states that Goh Chye Lai, DW2 himself and Ong Weng Seng had never disputed the particulars or the amount specified in the SPC. DW2 confirmed that ASE issued official receipts for all payments received. The plaintiff has not proved that the deductions made by the defendant were not in order as ASE had given their endorsement and the plaintiff is estopped from claiming otherwise. As regards SPC 19, I shall proceed to deal briefly with matters relating to the material supplied and the appointment of other contractors and direct payment made to them.

MATERIAL SUPPLIED

[14] From SPC 19, the defendant made deductions of RM1,516,757.56 for material supplied. In the SPC Final, the amount was RM1,750,266.40. DW1 testified that it has been the practice of the defendant for all subcontract work it awarded to supply building materials to ensure quality control, better pricing and in so doing, the subcontractor would be relieved of financial burden. Towards this end, in relation to the supply of cement sand brick, DW1 testified that the defendant had given permission to one of the subcontractor for phase 11A to operate in their project site a cement sand brick plant (referred in item 11.2 at p 349/E2) to supply cement sand brick for project use in phases 15A/1, 15A/2, 16A and 2B. The plaintiff had received cement supply from this plant

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

through their site representatives. The policy to supply building materials was implemented and executed not by means of unilateral imposition by the defendant onto the plaintiff but after a discussion had taken place on 1 June 1990 between Ong Beng Tean and Goh Chye Koon for the defendant and Goh Chye Lai for the plaintiff. Because there was no written agreement resulting from the discussion and there was only a verbal agreement, PW1 wrote a letter dated 15 June 1990 (pp 45 and 46/B1) to remind the defendant that there was such a verbal agreement. One can deduce from the letter the verbal agreement the parties had come to. The letter states 'We refer to our mutual agreement at the time of tender negotiation, that for all materials purchased by IJM on our behalf, you would debit us the supplier's discounted price plus 2½% service charge except for steel bars and cement … We would appreciate if you could furnish us the full account based on all the materials supplied to date and the above agreement'. Even though PW1 stated he expected the verbal agreement to be reduced into a written agreement, he later agreed that by looking at his letter at p 46/B1 there was no suggestion that a written agreement was intended to be executed on the supply of material. The letter had in effect confirmed the agreement by the plaintiff regarding the material supply and thus the plaintiff's contention that there was no agreement between the plaintiff and the defendant on material supply as there was no reply from the defendant to this letter of 15 June 1990 is unfounded. It is without hesitation that I hold that the plaintiff has full knowledge of the materials supplied by the defendant and this was done with the agreement of the plaintiff themselves and through ASE. The plaintiff, to my mind also cannot claim that they had not been furnished with the DN and DIN. DW1's testimony that the defendant had furnished the plaintiff the full account based on all material supplied by means of those DN and DIN are not rebutted. It is in evidence that PW1 admitted that the plaintiff did not purchase any material because the plaintiff had subcontracted the work totally to ASE and it was ASE which was responsible to purchase the material for the job. The testimony of DW2 confirmed that ASE had requested the defendant to order materials for them as can be seen at pp 92–97/E6. DW2 also confirmed that the direct material supplied have all been accounted for in the SPC which ASE collected together with the payment and all were passed to the plaintiff. Therefore there is no reason for the plaintiff not to know about the value of direct material supplied in each of the SPC. With evidence so clearly demonstrating the plaintiff's knowledge on the matter and the plaintiff's involvement was through ASE in totality, I do not think that I need to go through each and every item on the materials supplied by the defendant that has come under attack by the plaintiff.

[15] PW1 also asserted that at the material time, the plaintiff did not submit schedule of materials plan to the defendant, did not make requisition to the defendant for materials to be supplied and did not procure materials through the defendant by material requisition form. DW1's evidence in my view, had answered well all the issues raised and I see no reason to doubt them. He agreed

JOBNAME: No Job Name PAGE: 17 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

that there was a mention on material requisition form for material requisition (p 28/B3 para 1.05, 2.02 and at p 35 para 4.01) but those are the guidelines and standard procedures were later set by the storekeeper and project manager and the defendant would not reject requisition for material to be supplied even if these standard procedures are not adhered to. On the issue of the plaintiff did not appoint any authorised signatories and submitted signature to the defendant's supplier for concrete supply or the name and specimen signature of the person authorized to receive material supply on behalf of the plaintiff from the defendant of the defendant's supplier, I accept DW1's explanation that the plaintiff must have submitted to the defendant the name and specimen signature of person authorised by the plaintiff to make a requisition on behalf of the plaintiff as otherwise the defendant's head office would not be able to make the DN deductions. On PW1's contention that the plaintiff did not receive from the defendant any suppliers delivery orders that show confirmation and acknowledgement of receipt of materials by the plaintiff or any supplier invoices for materials alleged to have been supplied to the plaintiff, this is again devoid of merits. The DN show the plaintiff had received the material supplied. There were Goh Chye Lai's signature at the space received by — refer to pp 1116, 1117, 1118, 1119, 11120 and 1121/E4. The contention that the plaintiff did not request the defendant to deliver SPC to Goh Chye Lai, Cheng Chiang Boey or ASE and no letter of authorisation received from the plaintiff to authorise the defendant deliver the SPC to them is of no significance because ASE has always been acting as agent of the plaintiff. PW1 confirmed he received the letter dated 16 January 1996 (p 157/B1) which was written in response to his letter dated 27 December 1995 and the DN attached to it (pp 158–160/B1). PW1 admitted that the letter mentioned that those DN had previously been issued to the plaintiff together with all the monthly SPC and he admitted to receiving only four DN. The letter also invited the plaintiff to inspect and verify the DN at the defendant's account department if the plaintiff had misplaced them. As the plaintiff had elected not to verify or inspect the DN, I therefore do not see the plaintiff's denial as contained in a letter dated 19 January 1996 (p 174/B1) merit any consideration.

ON THE APPOINTMENT OF OTHER SUBCONTRACTOR AND THE DIRECT PAYMENT

[16] The next question is whether the defendant's appointment of the other subcontractors and whether such direct payment by the defendant to these other subcontractors were with the full knowledge of the plaintiff. From SPC19, it appears that the defendant had made deductions of RM601,684.84 for direct payment to other subcontractor. Deduction made in the SPC final was RM909,975 (see p 161/B1). The plaintiff claimed they made no request and never agreed to the defendant employing other subcontractors on behalf of the plaintiff and no details were provided on the terms and conditions of the

JOBNAME: No Job Name PAGE: 18 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

employment for the plaintiff's agreement. DW1 agreed that if the defendant was to employ other subcontractor to do the plaintiff's work, the defendant should have given written notice to the plaintiff, and the defendant did not send either the notice or the employment contract to the plaintiff. Be that as it may, the evidence of DW2 pertaining to the subject matter referred to earlier on must not be overlooked. DW2 had testified that ASE had ran into financial difficulties and needed assistance and he had given his consent for the defendant to appoint other contractors to complete the work on the plaintiff's behalf. So the plaintiff could not claim to have no knowledge over the employment. I also find that even without the employment contract be made available, there are evidence to show that the plaintiff was aware of the very existence of such appointment. The defendant had on a number of occasions written to the plaintiff reminding them to take measures to move on with their work in order to avoid delay in completing the project. PW1 admitted receiving the defendant's letter dated 23 July 1990 (p 5/B2) over the mobilisation and recruitment of workforce to execute the plaintiff's work. The plaintiff did not see it fit to reply the letter to express any disagreement. Instead, the plaintiff merely send the said letter to ASE, expressing concern that ASE had not abided by the defendant's instruction. Relying on the propositions laid down by the Court of Appeal in the case of *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1996] 1 AMR 7, if there had never been any failure on the part of the plaintiff in carrying out the project, it is only reasonable to expect from them a prompt and vigorous denial (see also *Caltex Oil Malaysia Ltd v Classic Best Sdn Bhd & Ors* [2007] 4 MLJ 772. By failing to do so, the plaintiff is estopped from denying the correctness of the contents of the letter. PW1 had in fact admitted that he had asked ASE to follow all directions from the defendant and the plaintiff must be held to be bound by its own admission in this regard. The plaintiff continued similar stand in respect of the letter from the defendant dated 26 July 1990 (p 7/B2) and three other letters dated 28 July 1990 (pp 9, 10, 11 and 14/B2) regarding door leaves, casement window and naco louvers and flashing at apex of party walls, PC rated items (wall tiling and floor tiling) and roof tiles. Again at pp 8, 12 and 13/B2, PW1 had asked ASE to follow the instructions from the defendant. The plaintiff had even copied the letters at pp 6, 8, 12 and 13/B2 to the defendant, meant to inform the defendant that the plaintiff had taken the necessary actions to follow the instructions stated in those letters. I shall again apply the propositions in the case of *Wong Hon Leong David v Noorazman bin Adnan* in these instances and I do hold that the plaintiff are bound by its admission. Whatever grounds forwarded by the plaintiff on the matter to assert claims that ASE had completed all works are mere afterthoughts.

[17] The particulars given by DW1 as outlined below give a clear insight on the appointment and the work that the subcontractors had carried out and the

JOBNAME: No Job Name PAGE: 19 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

payment made to them for the work done and it is my view that the plaintiff had not adduced any evidence to show that these matters should have been dismissed as they do not merit consideration:

(a) Mega Build Construction involving a payment of RM34,200. The SPC (p 70/E6) shows a sum of RM33,940. The details are worked out at p 71/E6 but the figures differ from RM34,200 in the SPC final at p 1581/E6 as there was a variance of RM260 because the defendant employed general workers to complete the cleaning. DW1 said the final account at p 1581/E6 is correct. The sub contractor SPC final for Mega Building Construction at p 71/E6 was prepared in January 1992 and was this given to plaintiff;

(b) Walley Metal Works Sdn Bhd — work done totaled RM54,260.20, detailed breakdown of the work in SPC No 12 for subcontractor at p 28/E6 which was prepared by SD1's colleague Tan Saik Moo. SPC 12 was for four phases. The breakdown for 15A/1 p 31–33/E6. The amount added up was RM50,643. These items were prepared in December 1992 and the SPC was given to plaintiff;

(c) Syarikat Tukang Besi Chze Tong Sdn Bhd — total RM79,438.40, the breakdown of the work done in SPC No 20 at p 76/E6 — this is SPC No 20 for sub contractor p 76/E6. This SPC was for four phases. The breakdown for 15A/1 is at p 79/E6 which shows amount RM79,438.40. The SPC was given to the plaintiff;

(d) High Tech Corp Sdn Bhd;

(e) General Lumber Fabrication and Builders Sdn Bhd — total RM205,202.74. The breakdown of work done was in SPC No 9 p 73/E6. This SPC was ready by SD1 in February 1994 and was given to the plaintiff's representative;

(f) Kapar Construction Sdn Bhd — total RM124,999.10. The breakdown of work done was in SPC Final at page 36/ E6 which was prepared by SD1. This SPC was for four phases. The breakdown for 15A/1 at p 38/E6 and the amount shown was RM124,998.52. There was a slight variation of 58 cents from the amount shown at p 1583/E5. This SPC was given to the representative of the plaintiff;

(g) Sun Lake Interior Decorator Co — total RM52,250. The breakdown of work done in SPC No 12 at p 84/E6. Also for four phases. The breakdown for phase 15A/1 at p 85/E6;

(h) Kapar Construction Sdn Bhd — total RM45,246.60. The breakdown of works done in SPC final at p 52/E6 which SPC final for laying of parquet flooring. This SPC is for four phases. The breakdown for phase 15A/1 is

JOBNAME: No Job Name PAGE: 20 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

at p 56/E6 where the total work add up to RM50,320.10. This figure does not tally with total amount in final account at p 1583/E5 as there was a variance of about RM5,000. SD1 explained that when he prepared the final account there was some adjustment whereby a smaller amount was to be deducted. This is because of architects instruction for variation order to change the original design, marble skirting to timber skirting for the ground floor with broken marble floor finish. The broken marble is omitted under p 1579/E5 of the final SPC to the plaintiff and the replacement with timber skirting is therefore not deducted from the account since the cost of marble skirting is already omitted. The SPC was given to the plaintiff's representative;

(i) IBF Sdn Bhd — total RM132,050. The breakdown of work done was in SPC Final at p 59/E6. This SPC was for two phases. The breakdown of only phase 15A/1 is at p 62/E6. This SPC was given to the plaintiff's representative;

(j) Perniagaan Bingkai Wilta — total RM26,718.75. The breakdown of work done is in SPC No 3 at p 34/E6. This SPC was for two phases. The breakdown for phase 15A/1 is at p 35/E6 — add up to RM23,198.40. This amount differs with 1583A/E5. There was a variance because Perniagaan Bingkai Wilta was no longer around and defendant purchased the glass louver blades and employ general workers to install and complete the work. The amount as approved in the final certificate is correct. The SPC was given to the plaintiff's representative;

(k) Masterseal Sdn Bhd — total RM6,942.13. The breakdown for work done was in SPC No 6 for sub-contractor Masterseal Sdn Bhd at p 68/E6 which was prepared by Tan Siak Moo. This SPC is was for two phases. The breakdown of phase 15A/1 is at p 69/E6 — add up to RM6,942.13. This SPC was given to the plaintiff's representative;

(l) Lim Kwee Choon — total RM14,025. The breakdown of work done is in SPC No 5 at p 88/E6. This SPC No 5 was given to the plaintiff or its representative;

(m) Sime UEP Appointed Supplier — for the supply of PC items totaling RM80,011.88. PC item stand for prime cost Item. They are broken marble supplied by Employer Sime UEP appointed supplier.

[18] It must be noted that PW1 agreed that he had raised the issues on SPC 19 only on 9 April 1994, almost three and a half years since the completion of the project on 30 April 1991. His excuse was that the defendant did not furnish

JOBNAME: No Job Name PAGE: 21 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

the final account to him despite request made by the plaintiff by letters dated 28 April 1992 and 23 February 1993 (see pp 145 and 149/B1). The defendant responded on 12 March 1993 stating that they were hoping to issue a provisional statement of the final account before end of March 1993 (see pp 150–151/B1). When no account was produced by the defendant then, the plaintiff made further request on April 1994 for the full account of the deductions made in SPC19 (see p 152/B1). The final account was produced by the defendant on 16 January 1996. DW1 explained that it took time because the defendant was finalizing the account with Sime UEP and they cannot finalise the account of the plaintiff until they have finalised the account with the employer because LAD was imposed on them and was deducted from their progress payment which would also be imposed on the plaintiff's final account. In the meantime, on 9 October 1995, the plaintiff requested the defendant to pay the balance sum of RM1,338,352.08 (p 153/B1) and in the process had admitted to the deduction of a total sum of RM2,804.442.40 being RM1,516,757.56 for material supplied by the defendant, RM601,684.84 for direct payment made by the defendant to the subcontractors and RM686,000 for progress payment received. PW1 disagreed that by asking the defendant to pay the amount of RM1,338,352.08, it tantamount to him accepting the deductions as appeared in that letter. I find it hard to believe that he had made no admission on the sum of RM2,804.442.40. PW1 clearly said that he did not by his letter asked for evidence on how the deduction came about, he only asked the plaintiff to settle the amount claimed. Of course when he was asking the defendant to pay RM1,338,352.08, that amount could only be arrived at if PW1 agree to minus the said deductions. This admission came about more than four years after the project was completed on 30 April 1991 and a lot of thoughts must be assumed to have been given before PW1 agreed to admit to the sum of RM2,804.442.40 as the deductions involved a substantial sum of money. The defendant did not reply this letter. The plaintiff wrote again on 27 December 1995, issuing an amended claim and now asking to be paid RM2,855,109.64 (see p 155/B1) constituting of RM1,338,352.08 + the amount for the material supplied RM1,516,757.56. It is interesting to note that in a matter of three months, the plaintiff have changed their mind twice. This reflect the plaintiff's uncertainty over the claim that they are entitled to make. PW1 however agreed that Appendix A to SPC 19 showed the details of the direct payment to other subcontractors for RM601,684.84 as shown at pp 123–126/B1 with the names of the subcontractor being mentioned. I therefore conclude by saying that based on the evidence viewed in totality, PW1 knew well there was the employment of other subcontractors after ASE was not able to complete the job. I hold that the plaintiff is bound by the admission they had made on the figure as specified in their letter at p 153/B1

JOBNAME: No Job Name PAGE: 22 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

and I reject the excuses he made for such admissions as lame and mere afterthought.

OMISSIONS IN THE SPC FINAL

[19] SPC final showed omissions amounting to RM798,347.02 (at pp 166–167/B1). In SPC 19, the amount for omissions was RM756,616.76 but PW1 admitted to make no mention of it in his letter of 9 April 1994. He said he did not do so because the defendant have to prove there was such an omission and at that time too he was still awaiting for the defendant's final account. DW1 explained that omissions means the value of work omitted from the plaintiff's scope of work which was not done by the plaintiff but by other subcontractors and there was also omission due to variation order issued by the architect deductions were made for:

(a) RM216,516.76 for external works within lot boundaries. The external work within the house boundary within the scope of the plaintiff's work are the fencing, gates, and dustbin compartment which were parts of the gates pillars, the parameter drain within that house unit and the driveway or driveway slabs. The external work outside house boundary not within the scope of the plaintiff's work were the roads and drains, the house entrance driveways slabs, the external water reticulation work, turfing, street lighting and sewer lines. PW1 claimed ASE completed the work but DW2 denied the same;

(b) RM500,000 for infrastructure works (provisional) (for external water supply for phase 11A,16A, 15A/1 and 15A/2). DW1 explained that the infrastructure works was included as a provisional amount because there was intention to subcontract to the plaintiff and the contract award of RM3,802,694.48 was inclusive of the infrastructure works as it was meant to be the plaintiff's work (item 8 p 2/E6). PW1's contention that the defendant was not entitled to deduct this amount as the sum did not form part of the subcontract sum is without basis as the subcontract sum of RM3,802,694.48 would have been considerably reduced if it be less RM500,000;

(c) preliminaries for RM40,000 was excluded as the plaintiff has not done the job;

(d) variation order by architect all together amounting to RM41,812.26 as in items 4(a) – (g) at p 167/B1;

JOBNAME: No Job Name PAGE: 23 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
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[20] The details of the omissions were particularized and shown in Appendix A at pp 166–167/B1. DW1 agreed that the defendant did not instruct the plaintiff to omit these works but the details that made up the amount was given with SPC 21 (p 286/B3) when the plaintiff collected the progress payment. PW1 admitted that when he received SPC 19, he also received appendix A and he agreed that with the appendix, he could see how the figures at p 166 were arrived at but those, according to him, were the defendant's calculations. The plaintiff however could not refute the correctness of the amounts as they were not able to introduce any documentary evidence to state otherwise. That, plus the fact that only ASE knew the work and the amount of the work that had actually been carried out proves that the plaintiff's claim that the omissions should not have been deducted is unsubstantiated.

[21] I would now conclude to say that the plaintiff has not proved on the balance of probabilities that they are entitled to the sum of RM3,461,670.19. I have no hesitation to say that the defendant has shown that they were justified in making the various deductions and omissions which denied the plaintiff of the amount claimed. I therefore dismissed the plaintiff's action with cost.

THE COUNTERCLAIM

[22] I shall not dwell on this claims by the defendant except to hold that the defendant has not proven its claim against the plaintiff but for the claim on the repairs and rectification works not completed by the plaintiff amounting to RM266,113.64. This sum has been amended from RM320,985.34 and the particulars are summarised in Appendix A to witness statement of DW1 ('WS2'). DW1 testified that they received complaints from Sime UEP about structured defects, plastering, roof tiles, etc and the plaintiff which was notified to rectify the defects failed to do so. The rectification works were done by NH Enterprise Sdn Bhd and Archiplan Construct Sdn Bhd. DW1 had prepared the SPC for the rectification works. The breakdown of these costs of rectification works can be seen at pp 98–133/E6 which is rectification for all phases done by NH Enterprise Sdn Bhd and at p 125/E6, it shows that DW1 has apportioned RM177,509.79 for phase 15A/1. This amount is extracted from Appendix A from pp 99–125/E6 and DW1 was working from the time sheet in arriving at the computation. DW1 stated further that the time sheet are not attached as bundles as they are too voluminous and I accept this as a reasonable explanation. As for the rectification work by Archiplan Construct Sdn Bhd, the amount for phase 15A/1 is RM88,603.85 (pp 126–133/E6). The plaintiff has not shown any evidence to refute the defendant's claim other than to say that

JOBNAME: No Job Name PAGE: 24 SESS: 1 OUTPUT: Thu May 12 14:49:56 2011
//caseml/case/mlj/2011_008_mlj_161

the claim was baseless and wrong. I also allowed the defendant cost and interest. The plaintiff is awarded costs for the other counterclaims that I had dismissed.

Plaintiff's action dismissed with costs and defendant's counterclaim allowed in part with costs.

Reported by Kohila Nesan